In forma pauperis
Petition not printed

Supreme Court of the United States

OCTOBER TERM, 1943

No. 394

MARTIN KANE FLAVIN,
Petitioner,

vs.

THE FRANKLIN SOCIETY FOR HOME-BUILDING AND SAVINGS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent respectfully submits the following brief in opposition to petition for writ of certiorari:

Statement

On March 16, 1942 respondent, The Franklin Society, sued in the New York Supreme Court to foreclose its mortgage of $2,437.88 (originally $3,000) on real property in Bronx County, New York. The mortgage required the owner to make monthly payments of $30 each, covering interest, taxes, assessments, water rates, insurance pre-

miums, and principal (fols. 34-36). On defaults of two months, respondent could declare the principal due (fols. 40, 90). When foreclosure was commenced below, the petitioner, Flavin, was in default since October, 1941, a period of five months (fol. 93). And when respondent moved for judgment of foreclosure in September, 1942, petitioner was already one year in arrears (fol. 59).

All this time Flavin had been a civilian. Civilian Flavin was a bachelor without dependents. He was employed. He lived in the mortgaged premises, rent-free. Until the receiver of the rents was appointed in August, 1942, Flavin also collected and retained out of the property rents of $27.50 a month, almost equal to the monthly mortgage payments of $30 which he chose not to make (fols. 59, 60).

Flavin was represented by his counsel, Mr. Sidney S. Levine, throughout the suit and up to and including this petition. In July, 1942 Flavin's counsel had interposed an answer, alleging that Flavin had made a tender to respondent, in January, 1942, of "arrears of taxes and interest," which tender was refused (fol. 99). Conceding non-payment of the monthly installments in arrears, Flavin's counsel nevertheless asserted that this tender was a complete defense to the subsequent suit, under Section 1077-a of the New York Civil Practice Act which suspends foreclosures if brought "solely for or on account of a default in the payment of principal."

On September 3, 1942, respondent moved to strike out the answer as frivolous, and for summary judgment, pursuant to Rule 113 of the New York Rules of Civil Practice (fol. 19). Respondent urged that a tender of taxes and interest only, even if made, would not have met the required monthly payments in arrears; that Section 1077-a of the New York Civil Practice Act had no application,

because this foreclosure was not "solely for or on account of a default in the payment of principal"; that in any event Section 1077-g of the Civil Practice Act exempts from the restraints of Section 1077-a "any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years," and also any mortgage made in accordance with the provisions of Section 380 (formerly 384) of the New York Banking Law, and this was such a mortgage.

The motion for summary judgment was opposed by Flavin, and affidavits and briefs were submitted by both parties (fols. 23-84). With respect to Section 1077-g of the Civil Practice Act, Flavin contended that this section did not apply, on the ground that this mortgage was payable in less than ten years, there being a privilege of prepayment. No question as to the constitutionality of Section 1077-g was raised.

On September 11, 1942 Flavin was inducted into the United States Army, Enlisted Reserve Corps, and on the same day he moved for a stay of all proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940 and the New York Military law. Flavin's motion came on to be heard at Special Term of the New York Supreme Court on September 22, 1942, as a cross-motion to respondent's motion for summary judgment. Affidavits and brief submitted by Flavin and his counsel, Mr. Levine, asserted that the Soldiers' and Sailors' Civil Relief Act "prohibited" foreclosure against a soldier, that Flavin was without funds, and that after the war Flavin might be able to raise funds and pay off the amount due to the respondent (fols. 52, 70).

The Justice at Special Term granted respondent's motion to strike out the answer and for judgment, on Sep-

tember 29th (fol. 103). He denied Flavin's motion for a stay, on October 3rd, stating that Flavin's induction "had nothing to do with his failure to meet the monthly payments specified in the bond," and that "no equitable purpose would be served by granting a stay of proceedings herein" (fol. 105).

No money judgment against Flavin was granted; respondent was empowered solely to realize on its security by foreclosure sale.

Petitioner appealed to the Appellate Division of the Supreme Court of the State of New York, which affirmed in all respects on April 9, 1943, stating that Flavin "failed to show that he had a defense to the action in foreclosure," and that his defaults in payment of principal, interest and taxes "occurred long before his entry into the armed forces. Moreover, no personal judgment is sought against him by respondent" (R. 7A). The Appellate Division further found as follows:

> "Upon the record, we are satisfied that the ability of appellant to comply with the terms of the mortgage or to conduct his defense to the action is not materially affected by reason of his induction into the military service. The statute is to be liberally administered as an instrument to accomplish substantial justice in order to protect the interests of persons in the military service, but it may not be employed as a means of enabling one who has flouted his obligations in civilian life to obtain indefinite delay or to cancel his just liabilities."
>
> *Franklin Soc. for Home-Building & Savings* v. *Flavin,* 265 App. Div. 720, 721.

Petitioner then appealed to the Court of Appeals of the State of New York, which affirmed, without opinion, on July 20, 1943 (291 N. Y. (mem.) 530).

Respondent, The Franklin Society, has refrained from foreclosure sale pending the present application for writ.

Questions Presented

The questions presented are:

1. Was a stay of proceedings refused to the petitioner under circumstances which denied rights given by the Soldiers' and Sailors' Civil Relief Act Amendments of 1942?

2. May petitioner now assert for the first time the question of the constitutionality of Section 1077-g of the New York Civil Practice Act, and if so, has petitioner been denied the equal protection of the laws?

Reasons for Disallowance of Writ

It is respectfully submitted that the petition for writ of certiorari should be denied for the following reasons:

1. Discretion was properly exercised in denying a stay of proceedings, because petitioner had flouted his obligations in civilian life and his subsequent induction on the eve of judgment had nothing to do with his long-standing civilian defaults.

2. The question of the constitutionality of Section 1077-g of the New York Civil Practice Act may not be raised for the first time in this Court, and in any event the claim that petitioner has been denied the equal protection of the laws is frivolous.

ARGUMENT

I

Discretion was properly exercised in denying a stay of proceedings, because petitioner had flouted his obligations in civilian life and his subsequent induction on the eve of judgment had nothing to do with his long-standing civilian defaults.

Petitioner Flavin's principal contention is that the denial of a stay by the New York courts "nullified" the Soldiers' and Sailors' Civil Relief Act, and particularly Section 700 of Article VII of the Amendments of October 6, 1942 (Petition, p. 13).

The contention has no merit, because:

a. The Act confers discretion on the trial court (*Boone* v. *Lightner*, 63 S. Ct. 1223; 87 L. Ed. 1099).

b. That discretion was soundly exercised in denying a stay in this case.

Section 700 of Article VII, relied on by petitioner, states that the court may grant relief in respect of an obligation or liability of a man in military service,

> "* * * unless in its opinion the ability of the applicant to comply with the terms of such obligation or liability * * * has not been materially affected by reason of his military service * * *" (Appendix, p. 11).

This Court, discussing the effect of a similar clause in Section 201 of the Act, recently stated that "* * * judicial discretion thereby conferred on the trial court instead

of rigid and undiscriminating suspension of civil proceedings was the very heart of the policy of the Act." (*Boone* v. *Lightner, supra,* 63 S. Ct. 1223, 87 L. Ed. 1099, 1102.)

Throughout the Act there is conferred on the trial court discretion to grant or withhold relief, based on its determination of this question: "Has military service actually and materially impaired the ability to defend or the ability to pay?" (see *e. g.* Sections 201, 203, 300(2), 302(2), 305(2), 700(1).)

Section 700 does not "prohibit" foreclosures, as petitioner contends (Pet. brief, pp. 10, 11). Section 700, like its predecessors, was intended for deserving cases:

> "Under the provisions of proposed Section 700 a person may make application for further relief, and the court may, in deserving cases, grant an order staying enforcement of obligations * * *" (Hearing before the Committee on Military Affairs, House of Representatives, 77th Cong., 2nd Sess. on H. R. 7029, May 22, 1942, p. 29.)

The case of Flavin was not a "deserving case," because, as the New York courts found, on ample evidence (R. 7A):

> Flavin wilfully dishonored his obligations; and
>
> military service had nothing to do with Flavin's defaults.

At no time during the year of defaults from October, 1941 to September, 1942, did Flavin, a civilian, pay up what was due. Living in the property rent-free, collecting rents, gainfully employed, a bachelor without dependents, Flavin owed a duty, by common standards of fair dealing, to meet the modest obligation of $30 a month due on his home. He flouted this obligation, delayed The Franklin Society in

the pursuit of its normal contractual remedies by interposing an answer found to have been frivolous, and then, on the eve of judgment, sought to invoke the Soldiers' and Sailors' Civil Relief Act to obtain further delay and escape the consequences of his own wrongdoing. Flavin was a defaulter long before he became a soldier,—he was not a defaulter because he was a soldier. The protection of the Act is not for him.

The particular section of the Act which treats of "Enforcement of Mortgage Obligations," is Section 302, sub. (2), which authorizes a stay of proceedings, with the familiar proviso:

> "unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service."

Since the passage of this good law in October, 1940, the New York courts have been exercising sound discretion to relieve soldiers and their dependents where military service has increased the burden of mortgage obligations, while rejecting efforts to abuse the purposes of the Act where it is invoked in non-meritorious cases. (See cases cited in Quat, *Judicial Discretion in Staying Mortgage Foreclosures under the Soldiers' Relief Act,* New York Law Journal, May 18, 1943, p. 1940; May 19, 1943, p. 1958.)

Petitioner also cites subdivision 3 of Section 302 of the Act (Pet. brief, p. 6). That subdivision has no application to the foreclosure of real estate mortgages by judicial proceedings, as in this case. Subdivision 3 was meant to bar "self-help" by creditors. It deals with foreclosures *out of court,* such as chattel mortgage foreclosures under power of sale, and real estate mortgages by entry and possession.

(Hearings before the Committee on Military Affairs, House of Representatives, 77th Congress, 2nd Session, on H. R. 7029, May 22, 1942, p. 17, and report of Senate Committee on Military Affairs, 77th Congress, 2nd Session, S. 1558, at p. 5, to accompany H. R. 7168.)

II

The question of the constitutionality of Section 1077-g of the New York Civil Practice Act may not be raised for the first time in this Court, and in any event the claim that petitioner has been denied the equal protection of the laws is frivolous.

Petitioner claims that Section 1077-g of the New York Civil Practice Act "grants special privileges to savings and loan associations resulting in unequal protection of the law to the petitioner" (Pet. brief, p. 15). This is frivolous, because:

1. This question was not raised nor considered at any time in any court below, and may not be raised here for the first time. (*Chicago, I. & L. Ry. Co.* v. *McGuire,* 196 U. S. 128, 131.)

2. Petitioner's argument is that, but for the exemption conferred by Section 1077-g in favor of long-term, monthly-payment, savings-and-loan-association mortgages, respondent would have been barred from foreclosing by Section 1077-a, which suspends foreclosure if brought "solely for or on account of a default in payment of principal • • •" Section 1077-a, however, does not apply in this case. This foreclosure was not brought solely for "principal" defaults, but for defaults in composite monthly installments which included interest, taxes, assessments, water rates, insurance premiums *and* principal (fols. 34-36).

3. Section 1077-g as it applies to "any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan," is constitutional. The New York moratorium laws were imposed to meet "a serious public emergency" affecting distressed property owners (Laws of New York of 1933, Chapter 793, § 1). The burden of an owner subject to the savings and loan association type of long-term, monthly-payment mortgage was relatively slight. Legislative exemption of such a mortgage bears a "reasonable and just relation" to the object of the moratorium legislation; on the contrary, to *impose* moratorium restraints on mortgages of this type would be of doubtful validity. (See *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398, 445.)

Conclusion

It is respectfully submitted that the discretion exercised by the New York courts in denying a stay of proceedings was abundantly justified, and that there is no substantial federal question here presented, and that the petition should be denied.

Respectfully submitted,

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